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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KENNETH LEE LUTH et al., Plaintiffs and Appellants, v. DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES et al., Defendants and Respondents.	B171297 (Los Angeles County Super. Ct. No. BC293683)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

Howarth & Smith, Don Howarth, Suzelle M. Smith and David K. Ringwood for Plaintiffs and Appellants.

LeBoeuf, Lamb, Greene & MacRae, Vincent J. Davitt, Jared M. Katz; LeBoeuf, Lamb, Greene & MacRae, Ronald L. Rencher and Mark W. Dykes for Defendants and Respondents.

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Kenneth Lee Luth and 46 other plaintiffs appeal from an order of the trial court staying their action against the Department of Water and Power for the City of Los Angeles (DWP), the Southern California Public Power Authority (SCPPA),[1] the Intermountain Power Agency (IPA), the Intermountain Power Service Corporation (IPSC), and the Intermountain Power Project Corporation (IPPC) on the ground of forum non conveniens. Appellants contend that the trial court applied the wrong legal standard in ruling on respondents' motion and that the trial court abused its discretion in weighing the factors relevant to a determination of inconvenient forum. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

Appellants filed their complaint in Los Angeles Superior Court in April 2003. They filed the first amended complaint (FAC) in June 2003. In July 2003, the SCPPA demurred to the FAC, and the DWP, the IPA, the IPSC, and the IPPC filed a motion to dismiss or stay the action because of forum non conveniens. The trial court heard both matters and granted the demurrer with leave to amend in September 2003. Appellants filed a second amended complaint (SAC). In October 2003, the trial court granted the motion to stay the action on forum non conveniens grounds. This appeal followed.

I. *The SAC*

The SAC alleges nine counts: count 1 (negligence), count 5 (trespass), count 6 (public nuisance), and count 7 (private nuisance) against all defendants; and count 2 (strict liability based on defective manufacture), count 3 (strict liability based on defective design), count 4 (strict liability based on failure to warn), count 8 (fraud), and count 9 (negligent misrepresentation) against the IPSC. The claims are based upon the assertion that the Intermountain Power Project (IPP), which was built to provide electricity to Los Angeles

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[1] The SCPPA did not file a motion for stay or dismissal and is not a respondent herein.

and surrounding communities, has exposed appellants' dairy farms to stray electrical current.

The SAC alleges the following. Appellants are "owners, assignees of owners, and operators of dairy farms in and around Adelanto, California, and Millard County, Utah." The DWP was designated the manager and operating agent in charge of construction, operation, and maintenance of the facilities of the IPP. The IPP generation and transmission system consists of a two-unit coal-fired plant that generates AC power, a current conversion station that converts AC power to DC power, a 490-mile transmission line to transport the DC electricity to California, and a current conversion station in Adelanto, California, which converts the DC power to AC power for sale to Los Angeles and surrounding communities. The IPP first transmitted electrical power into California in 1987.

Because of its design, planning, construction, and maintenance, the IPP releases current and electricity into the earth and underground water aquifers, causing stray current to invade surrounding farms. Respondents and SCPPA made representations that induced certain plaintiffs to locate their dairies in the path of the stray current and also failed to warn of the problem.

Stray current is particularly harmful to dairy cows. Appellants' farms have experienced loss of milk production, high rates of death and disease, and low calving rates. These problems have led to low land values and emotional distress.

II. *The motion to stay or dismiss*

In support of their motion to stay or dismiss on the ground of forum non conveniens, respondents put on evidence tending to show the following. Millard County, Utah, is the location of 25 of the 27 dairy farms at issue in this case, and 45 of the 47 plaintiffs either are or own Utah dairy farms. Only two of the allegedly affected farms are in California.

The chief component of the IPP is a generating plant located in Millard County. The IPP is wholly owned by the IPA, a political subdivision of the State of Utah. The IPA's offices are located in Utah, and have never been located outside of Utah.

Although the DWP is the operating agent for the IPP, the daily operations of the generating plant are carried out by the IPSC, a Utah non-profit entity located at the plant site in Millard County. The IPSC has 491 employees and conducts no business other than that associated with the generating station. None of its employees works in California. Of the nine counts, five are alleged solely against the IPSC. IPSC employees in charge of the daily operations of the generating station would have to testify to rebut appellants' allegations. The absence of the employees while testifying in California would pose a hardship to the operation of the generating station. Their attending trial 45 minutes away in Fillmore, Utah, is far more convenient for the IPSC. Other witnesses, including veterinarians, electricians, and dairy farm employees, are also located in Millard County.

The SCPPA owns no part of the IPP and has no authority to control that entity. Its role in connection with the IPP was to make payments to the IPA in connection with the construction of the transmission line and converter stations.

In opposition, appellants put on evidence tending to show the following. Almost all of the power produced by the generating plant is transmitted to California, and one of the converter stations is in California. DWP designed and constructed the equipment involved and has maintained a role in the IPP. The SCPPA sold notes and bonds to provide the initial funding. Moreover, the Millard County court in Utah is insufficient to handle the case. The population of Millard County is approximately 12,400, and the courthouse in Fillmore has only one courtroom used for civil cases not heard in justice court. One judge is assigned hear the civil cases for three counties, including Millard County. There is no commercial airport in the Fillmore area. Approximately 500 of the 12,400 residents of Millard County are employed by IPA, IPSC, or the IPP. One of the original plaintiffs directed counsel to remove him from the action after being threatened with loss of employment by his employer, IPSC.

Respondents, in reply, offered a declaration from the trial court executive for the Fourth Judicial District of the State of Utah, who stated that if the judge assigned to Millard, Juab, and Wasatch Counties determines that he requires assistance, additional judges could be assigned to assist.

III. *The ruling*

The trial court granted a stay on the ground of forum non conveniens. Its minute order granting the stay states: "For the reasons set forth more fully below, the court hereby stays this action. The court finds that Utah provides an available forum in which to try the case which would be very much more convenient than California, and Utah has a far greater interest than California in doing so. Thus, in the interest of substantial justice, the court finds this action should be heard in Utah. [¶] This case involves 47 dairy farmers who allege damage to their herds and businesses caused by unconstrained 'stray' electricity created and transmitted by defendants. Twenty-five of the 27 damaged dairy farms are in Utah. Forty-five of 47 plaintiffs either are or own Utah dairy farms. The overwhelming majority of the evidence and witnesses (not to mention the cows and the real estate) are in Utah. The defendants are a Utah power plant owned by a Utah political entity and operated by a Utah corporation. In addition, the Los Angeles DWP is a defendant, because it was the construction manager for the project and is the operating agent for the Utah power plant owner. However, the Utah power plant owner and DWP formed another Utah corporation to carry out the daily operations of the plant. Finally, the Southern California Public Power Authority (SCPPA) is a defendant for reasons that are not clear to the court. SCPPA alleges that it has no ownership interest or right to control the power project and therefore cannot possibly owe plaintiffs any duty. If SCPPA remains a defendant in this action, then, as stated on the record in court on September 16, 2003, SCPPA will submit to the jurisdiction of the Utah court. Thus, all defendants are subject to the jurisdiction of the Utah courts. No statute of limitations has run; moreover, defendants stated on the record in court on September 16, 2003, that the statute of limitations is tolled during the pendency of this action. [¶] Utah has a far greater interest in the outcome of this case than California. It makes little sense to ask a Los Angeles jury to decide this dispute; in other words, this court finds the Los Angeles community simply has little or no concern for the matters in dispute here. The court doubts that Utah is unable to provide adequate facilities and a jury pool to resolve this matter. In the event that Utah finds it has no appropriate venue that is equipped

to handle this case, then California will provide a forum for redress of plaintiffs' grievances. The Utah courts are far better able than this court to determine the validity of plaintiffs' fears of being 'small-towned' or 'company-towned' or otherwise denied a fair trial."

DISCUSSION

I. **Legal standard**

Forum non conveniens is "an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citation.]" (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).) Code of Civil Procedure section 410.30 provides: "(a) When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."[2]

The first step in the analysis is whether the alternative forum is a suitable place for trial, that is, whether there is jurisdiction and no statute of limitations bar to hearing the case on the merits. (*Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186.) We review this issue de novo. (*Ibid.*)

In the present case, respondents showed that Utah's jurisdiction reaches to all defendants. DWP and SCPPA consented to Utah's jurisdiction, as well as to the tolling of the statute of limitations during the pendency of the action in California. Utah is thus a suitable forum.

Appellants urge that the trial court failed to make a determination of suitable forum because it stated that the Utah courts are better able to determine the issue of jury pool

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[2] As appellants point out, a 1986 amendment to the statute stated, "'The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. (Stats. 1986, ch. 968, § 4, p. 3347.)'" (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487.) The amendment expired in 1992, leaving the doctrine as declared prior to 1986. (*Ibid.*)

prejudice. Jury pool prejudice is not relevant to a determination of suitable forum: "[A] forum is suitable where an action 'can be brought,' although not necessarily won." (*Shiley Inc. v. Superior Court* (1992) 4 Cal.App.4th 126, 132 [a state that does not recognize a cause of action may still be a suitable forum].) The trial court was not required to find whether there would be jury pool prejudice in Utah as part of its ruling on suitable forum.

"[T]he next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Stangvik*, *supra*, 54 Cal.3d at p. 751.) The private interest factors include "ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Ibid.*) "The trial court's balancing of these factors is entitled to substantial deference." (*Roulier v. Cannondale*, *supra*, 101 Cal.App.4th at p. 1188.)

Appellants contend that the trial court applied the wrong legal standard in granting respondents' motion for a stay on the ground of forum non conveniens. According to appellants, the trial court erred in balancing the forum non conveniens factors, because it is precluded from staying an action where there are California plaintiffs and defendants. We disagree.

According to *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853 (*Archibald*), relied upon by appellants, only in an extraordinary case can a court *dismiss* an action by a California resident on the ground of forum non conveniens. (*Id.* at p. 858 [reversal of dismissal where plaintiffs were California residents].) "In considering whether to stay an action, in contrast to dismissing it, the plaintiff's residence is but one of many factors which the court may consider. The court can also take into account the amenability of the defendants to personal jurisdiction, the convenience of witnesses, the expense of trial, the choice of law, and indeed any consideration which legitimately bears upon the relative suitability or convenience of the alternative forums." (*Id.* at p. 860.)

The trial court has considerably wider discretion to grant stays because under a stay California retains jurisdiction. For that reason, even an action brought by a California resident is subject to a stay. (*Century Indemnity Co. v. Bank of America* (1997) 58 Cal.App.4th 408, 411 [action brought by two insurers, one of which was a California resident, where all parties were part of a declaratory relief suit brought in Hawaii] (*Century*); and see *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753, 761 [a plaintiff and a defendant were California residents, but decedents' exposure to asbestos occurred primarily in Montana]; *Dendy v. MGM Grand Hotels, Inc.* (1982) 137 Cal.App.3d 457, 460-461 [plaintiffs and some defendants were California residents, but the hotel fire was in Nevada].)

Appellants cite *Stangvik*, *supra*, 54 Cal.3d 744, *Archibald*, *supra*, 15 Cal.3d 853, *Beckman v. Thompson*, *supra*, 4 Cal.App.4th 481, and *Bechtel Corp. v. Industrial Indem. Co.* (1978) 86 Cal.App.3d 45 for the proposition that forum non conveniens does not apply where the action includes both California plaintiffs and California defendants. The authority relied upon by appellants is distinguishable, and does not support the position urged by appellants. *Archibald* and *Beckman v. Thompson* reversed dismissals of actions brought by California residents. (*Archibald*, *supra*, at pp. 858-859; *Beckman v. Thompson*, *supra*, at p. 489.) *Stangvik* affirmed the grant of a stay on the ground of forum non conveniens where the plaintiffs resided in foreign countries and the defendant corporation was a resident of California. (*Stangvik, supra,* 54 Cal.3d at p. 755.) In *Bechtel Corp. v. Industrial Indem. Co.*, *supra*, 86 Cal.App.3d at pages 52-53, the court stated, "where both parties to an action are California residents, the defendant's motion to stay, or to dismiss, the action under the doctrine of forum non conveniens may not be granted." There, however, the plaintiff and the defendant were both California residents, and the controversy involved a California contract. (*Ibid.*) It is distinguishable from the present case, where most of the parties are residents of Utah.

II. **Abuse of discretion**

Appellants contend that even if it is proper to balance the relevant factors, the trial court abused its discretion because it failed to acknowledge the strong preference for a California forum that arises where plaintiffs and defendants are California residents. Again, we disagree.

There is a strong preference for a California forum where the parties are residents of California. (*Century*, *supra*, 58 Cal.App.4th at p. 412; *Dendy*, *supra*, 137 Cal.App.3d at p. 460 ["a plaintiff's choice of forum should be respected unless equity weighs strongly in favor of the defendant"]; and see *Stangvik*, *supra*, 54 Cal.3d at pp. 754-756 [a defendant's resident state is presumptively a convenient forum].) There is no indication, however, that the trial court failed to recognize that preference.

The trial court found that Utah provides a forum "very much more convenient" than California, and that Utah "has a far greater interest than California" in providing a forum. As the trial court noted, 25 of the 27 dairy farms are in Utah, 45 of the 47 plaintiffs are or own Utah dairy farms, and the overwhelming majority of the evidence are in Utah. In addition, third party witnesses including dairy farm employees, electricians who worked on the farms, and local Utah veterinarians are in Utah. Although the DWP is a California entity, the operating work for the generating plant is performed by the IPSC, a Utah corporation located in Utah. The IPSC is the sole defendant in five of the counts. The absence of IPSC employees from the station would cause hardship to plant operations. The balance weighs strongly in favor of respondents and supports the trial court's order. Given Utah's strong public policy interest in the controversy and the lack of a strong countervailing justification for proceeding in California, we cannot say the trial court abused its discretion in staying the action.

Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal.App.3d 1553, *Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, and *American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, relied upon by appellants, are distinguishable. *Northrop Corp. v. American Motorists Ins. Co.*, *supra*, 220 Cal.App.3d at pages 1565-1566, reversed a dismissal based on forum non conveniens,

where the plaintiff corporation was a California resident and the dispute involved an insurance policy obtained in California. *Ford Motor Co. v. Insurance Co. of North America*, *supra*, 35 Cal.App.4th at page 617, reversed a dismissal in an insurance coverage case where the environmentally contaminated sites in issue were in California. *American Cemwood Corp. v. American Home Assurance Co.*, *supra*, 87 Cal.App.4th at page 437, reversed a stay, holding that a stay could not be granted where the moving party failed to demonstrate that all the defendants were subject to jurisdiction in the alternative forum. Here, SCPPA agreed to jurisdiction in Utah, should the stay be granted.

DISPOSITION

The order appealed from is affirmed. Respondents shall recover their costs of appeal from appellants.

NOT FOR PUBLICATION.

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We concur:

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BOREN

_____, J.
ASHMANN-GERST